

STATE OF SOUTH CAROLINA	)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND	)	
	)	<b>DECISION</b>
In the Matter of Protest of:	)	
	)	CASE No. 2009-162
	)	
AccuDiagnostics	)	
	)	
	)	
Materials Management Office	)	POSTING DATE: February 8, 2010
RFP No. 5400001023	)	
Statewide Term Contract for Drug and	)	MAILING DATE: February 8, 2010
<u>Alcohol Testing and Background Checks</u>	)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from AccuDiagnostics. With this request for proposals (RFP), the Materials Management Office (MMO) attempts to procure a statewide term contract for drug and alcohol testing and background checks. In its emailed letter, AccuDiagnostics protested MMO's intent to award to FirstLab alleging:

1. AccuDiagnostics bid total was \$500,545.00 whereas the winning bid total was \$464,225.00. As a South Carolina Resident Vendor AccuDiagnostics is afforded a 7% preference per the South Carolina Code of Laws Section 11-35-1524. This 7% SC Resident Vendor preference brings the total cost to \$465,506.85. Was this preference taken into account?
  
2. Under the RFP section for State Employee and Student Background Checks the awarded bid quoted their price in addition to a footnote which stated there would be a pass through for state access fees accrued from the background checks. The South Carolina state access fees for background screens are \$25.00 per applicant or up to an additional \$25,000 for the 1000 background screens required in the bid. The Request for Proposal did not stipulate that access fees were to be separated from the service provided. AccuDiagnostics quoted a fixed price which included any applicable state access fees. AccuDiagnostics quoted the price this way because the company's vendor also includes the access fees in the service in order to give full disclosure of the costs upfront. After the SC Resident Vendor Preference there is a \$1,281.85 difference between the awarded contract quote and the AccuDiagnostics quote. If the awarded contract were to reflect, even a minimum dollar amount per background check, AccuDiagnostics would have the price advantage. If the State would like access fees to be removed, AccuDiagnostics should have the opportunity to provide a price which reflects the change. AccuDiagnostics is concerned on the accurate comparison of the two quotes with respect to the Background Checks.

As the legal issues to be decided are clear, this matter is being decided based upon an administrative review of the procurement file.

### **NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference.

### **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On July 22, 2009, MMO issued the RFP.
2. On July 30, 2009, MMO issued Amendment #1.
3. On August 11, 2009, MMO issued Amendment #2.
4. On August 24, 2009, MMO issued Amendment #3.
5. On August 25, 2009, MMO issued Amendment #4.
6. On August 31, 2009, MMO issued Amendment #5.
7. On September 14, 2009, MMO opened the proposals received.
8. After the evaluators scored the proposals, the composite scores were:

<u>Offeror</u>	<u>Total Score</u>
FirstLab	457.55
Pembrooke	385.75
AccuDiagnostics	377.60
RN Expertise	363.00
SR&I	358.50

9. On December 9, 2009, MMO posted a notice of intent to award to FirstLab.

## CONCLUSIONS OF LAW

In protest issue #1, AccuDiagnostics questions whether the South Carolina Resident Vendor preference was taken into account.

Section 11-35-1524(5) of the South Carolina Consolidated Procurement Code (Code), which provides for the resident vendor preference reads, “This section does not apply to an acquisition of motor vehicles as defined in Section 56-15-10 or an acquisition of supplies or services relating to construction. **This section does not apply to a procurement conducted pursuant to** Section 11-35-1550(2)(a) or (b), **Section 11-35-1530**, or Article 9 of Chapter 35.” (Emphasis added.) Since this procurement was processed as a competitive sealed proposal under Section 11-35-1530, the South Carolina resident vendor preference does not apply. Therefore, the preference was not taken into account, which was proper. Accordingly, this allegation fails to state a claim and is denied.

In protest issue #2, AccuDiagnostics asserts that FirstLab offered incomplete pricing for their background checks, specifically Item #7 Background Checks – State Employees and Item #8 Background Checks – Students in its response to the RFP. Specifically, AccuDiagnostics noted it had quoted a complete fixed price, which included the access fees, and was concerned whether there was an accurate comparison of their quotes with respect to the background checks.

FirstLab’s initial response did not comply with the RFP in that its price for background checks was not fixed, as required by the RFP. Instead First Lab qualified its price offer for background checks writing in line item 7, Criminal Background Checks – State Employee and line item 8, Criminal Background checks – Students, by offering a price of \$41.25 “plus any access fee.” [First Lab’s Redacted Proposal, p. 61] FirstLab later explained that

State access fees for criminal checks can run anywhere from “No Charge” up to a maximum of \$55.00/inquiry (charged by NY State). South Carolina charges a \$26.00 access fee per check and based on the assumption that the majority of the criminal checks will be run on South Carolina residents, FirstLab has added the \$26.00 fee to our current proposed price.”

Following the opening of the proposals, MMO Procurement Officer Georgia Gillens engaged in discussions with five offerors determined to be reasonably susceptible of being selected for award. Under authorization from the CPO, on December 1, 2009, Ms. Gillens sent messages via electronic mail to FirstLab, Pembroke, AccuDiagnostics, RN Expertise, and SR&I identifying incomplete or non-responsive aspects of each proposal and allowing each offeror to revise their proposal by December 2, 2009. Specifically, Ms. Gillens entered into discussions with FirstLab regarding its price for background checks. FirstLab responded to Ms. Gillens by providing an amended fixed price for criminal background checks of \$67.25 each for line items 7 and 8 and an amended total offer of \$508,475 (up from the initial total price offer of \$482,475) thereby complying with the requirement of the RFP for fixed prices.<sup>1</sup> FirstLab's proposal was then evaluated and scored based upon this fixed price.

The Code authorizes such exchanges. S.C. Code Ann. § 11-35-1530(6) reads,

As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.

Regulation 19-445.2095 elaborates on the Code, reading:

I. Discussions with Offerors

(1) Classifying Proposals.

For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:

- (a) acceptable (i.e., reasonably susceptible of being selected for award);
- (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or

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<sup>1</sup> The CPO notes that FirstLab and AccuDiagnostics were both allowed to submit revisions of their proposals.

(c) unacceptable.

(2) Conduct of Discussions.

If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

(a) Control all exchanges;

(b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

(c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

(d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

(e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

(3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

(4) Communications authorized by Section 11-35-1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the appropriate chief procurement officer.

As stated above, Ms. Gillen determined that certain offerors were reasonably susceptible of being selected for award and entered into discussions in writing after being authorized by the CPO. Therefore, her actions were warranted under the Code and the supporting Regulation. AccuDiagnostics offered no evidence that these discussions were not conducted properly or that there was an inaccurate comparison of prices. According, this allegation is without merit and is denied.

**DETERMINATION**

For the aforementioned reasons, the protest of AccuDiagnostics is denied.



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R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

February 8, 2010

Date

Columbia, S.C.

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

## Skinner, Gail

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**From:** Protest-MMO  
**Sent:** Wednesday, January 20, 2010 4:55 PM  
**To:** \_MMO - Procurement; Shealy, Voight; Skinner, Gail  
**Subject:** FW: RFP#5400001023

**Attachments:** image001.jpg

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From: Covey, Daniel  
Sent: Wednesday, January 20, 2010 4:54:48 PM  
To: Protest-MMO  
Subject: FW: RFP#5400001023  
Auto forwarded by a Rule

Daniel W. Covey, CPPB  
Procurement Manager  
Materials Management Office  
1201 Main Street - Suite 600  
Columbia, SC 29201  
Phone: 803-737-0674  
Cell: 803-586-9527  
Fax: 803-737-0639

-----Original Message-----

From: Felix Mirando [mailto:fmirando@accudiagnostics.com]  
Sent: January 21, 2010 4:13 PM  
To: Covey, Daniel  
Cc: 'Jon Lewis'  
Subject: FW: RFP#5400001023

This is the protest response I sent December 18, 2009.

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From: Felix Mirando [mailto:fmirando@accudiagnostics.com]  
Sent: Saturday, December 19, 2009 4:28 PM  
To: 'protestmmo@mmo.sc.gov'  
Subject: RFP#5400001023

December 18, 2009

AccuDiagnostics

355 Woodruff Road, Ste 404



Greenville, SC 29607

(864) 609-5015

Vendor # 7000069711

RFP # 5400001023

Re: Formal Letter of Protest

RFP # 5400001023

To Whom It May Concern:

AccuDiagnostics would like to submit this letter as a formal protest for the award of the South Carolina Drug and Alcohol Testing and Background Checks Solicitation RFP # 5400001023. AccuDiagnostics has provided all of the necessary information required by the South Carolina Materials Management Office for this solicitation.

On December 1, 2009 AccuDiagnostics was sent an "Urgent Notice" requiring a Request for Proposal Revision with a twenty-four hour response deadline. The notice stated our "proposal has been classified as potentially acceptable". The notice required an update to our collection sites to ensure there were sites available within a thirty mile radius of each DOT location. This was accomplished with the revised list being returned to Ms. Gillens before the close of business on December 2, 2009. The award date was then moved to December 9, 2009 which was the fifth extension under this RFP.

AccuDiagnostics would like to bring the following discrepancies once the bid was awarded:

1. AccuDiagnostics bid total was \$500,545.00 whereas the winning bid total was \$464,225.00. As a South Carolina Resident Vendor AccuDiagnostics is afforded a 7% preference per the South Carolina Code of Laws Section 11-35-1524. This 7% SC Resident Vendor preference brings the total cost to \$465,506.85. Was this preference taken into account?

2. Under the RFP section for State Employee and Student Background Checks the awarded bid quoted their price in addition to a footnote which stated there would be a pass through for state access fees accrued from the background checks. The South Carolina state access fees for background screens are \$25.00 per applicant or up to an additional \$25,000 for the 1000 background screens required in the bid. The Request for Proposal did not stipulate that access fees were to be separated from the service provided. AccuDiagnostics quoted a fixed price which included any applicable state access fees. AccuDiagnostics quoted the price this way because the company's vendor also includes the access fees in the service in order to give full disclosure of the costs upfront. After the SC Resident Vendor Preference there is a \$1,281.85 difference between the awarded contract quote and the AccuDiagnostics quote. If the awarded contract were to reflect, even a minimum dollar amount per background check, AccuDiagnostics would have the price advantage. If the State would like access fees to be removed, AccuDiagnostics should have the opportunity to provide a price which reflects the change. AccuDiagnostics is concerned on the accurate comparison of the two quotes with respect to the Background Checks.

Please accept this letter as a formal protest for RFP # 5400001023 as an opportunity to view the charges on a comparable level. AccuDiagnostics is a South Carolina based company with six physical locations statewide which all provide South Carolina revenue and benefits. In addition, the company has an in house South Carolina Physician as our Medical Review Office (MRO), and has made every attempt to utilize South Carolina companies to fulfill the bid requests.

Sincerely,

Felix Mirando

President/CEO

AccuDiagnostics

Felix Mirando | President/CEO

Occupational Drug Screening

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